Osman Daud (trading under the name and style of RSZ Trading) v Asal Bina Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO MT(4) 22–167 OF 2007
KAMARDIN HASHIM JC
11 AUGUST 2009

Civil Procedure — Estoppel — Res judicata — Settlement between parties and consent judgment recorded — Subsequent action by plaintiff to claim balance moneys payable — Whether action could have been disposed in earlier proceedings — Whether plaintiff estopped from commencing present action — Whether res judicata applicable — Whether action ought to be struck out for abuse of process — Rules of the High Court 1980 O 18 r 19(1)(d)

Civil Procedure — Judgments and orders — Consent order — Terms of — Whether full and final settlement — Whether binding on parties — Whether plaintiff allowed to add words or vary terms — Whether consent order acts as estoppel

In consideration of the plaintiff securing a government contract, the defendant, vide a letter of undertaking, agreed to pay the plaintiff 4% of the total project value. The agreed mode of payment was by three tranches/installments. The first tranche for the sum of RM100,000 was due upon the issuance of the letter of intent ('LOI') by the government. The second tranche, for the amount of 50% of the remaining amount, was due upon receipt of mobilisation fee from the government. The third tranche ie, 50% of the remaining amount, was due upon receipt of the first progress payment from the government. As the defendant had failed to pay the plaintiff the sums agreed under the said agreement, the plaintiff commenced this action against the defendant in the sessions court. The defendant disputed the plaintiff's entire claim. During the trial at the sessions court, the plaintiff and the defendant reached a settlement and recorded a consent judgment, wherein without admission of liability the defendant agreed to pay the plaintiffs the sum of RM65,000 as full and final settlement of the plaintiff's claim which was based on the said agreement. Subsequently, the plaintiff commenced the present action against the defendant based on the same agreement wherein the plaintiff now alleged that since the value of the government contract awarded was RM11,700,000 the 4% of the value of the project would be RM486,000. In the present action, the plaintiff was claiming for the sum of RM368,000 which represented the second and third tranches due under the said agreement after deducting the sum of RM100,000 for the first tranche claimed in the sessions court. The defendant contended that since the sums claimed had

arisen from the said agreement, the plaintiff ought to have claimed all of the sums due in its first action wherein a consent judgment was recorded. Hence, the defendant contended that the plaintiff was estopped entirely from commencing the present action against them due to the doctrine of res judicata and also in view of the consent judgment entered in the sessions court action. The plaintiff however submitted that the present suit between the parties was in respect of the breach of the said agreement by the defendant in respect of claims for the second and third installments. Further, the consent judgment was entered without admission of liability and on a without prejudice basis. The deputy registrar allowed the defendant's application to strike out the plaintiff's claim as it was an abuse of the process of the court. Against the said decision, the plaintiff appealed to this court and the only issue for consideration of this court was whether or not the plaintiff's claim was an abuse of process.

Held, dismissing the plaintiff's appeal with costs:

(1) The principle of res judicata applies in the present case. The plaintiff had failed to bring forward its whole case and instead appeared to have brought part of its case in the sessions court now attempted to bring the rest of its case in the High Court although the same could fairly have been disposed in earlier proceedings between the same parties. This court must be vigilant in precluding a party from re-agitating in subsequent proceedings a complaint which could fairly have been disposed in earlier proceedings between the same parties in the sessions court (see para 17).

(2) It is clear on the face of the consent judgment and from the plain and ordinary reading that it is expressed to be a full and final settlement. There was nothing expressed in the terms of the consent judgment stating that the plaintiff had reserved the right to pursue the claim under paras 2 and 3 of the said agreement (see para 24).

(3) The terms of the consent judgment must be read and understood as it stands and the plaintiff ought not to be allowed to add words or vary the terms of the said consent judgment. It is trite law that a consent order is evidence of the contract between the parties and is binding on all parties to the order (see para 25).

[Bahasa Malaysia summary

Sebagai ganjaran plaintif mendapatkan kontrak kerajaan, defendan, menerusi surat akujanji, bersetuju membayar plaintif 4% daripada jumlah nilai projek. Cara pembayaran yang dipersetujui adalah dengan tiga kali ansuran/tranche. Tranche pertama berjumlah RM100,000 terakru dengan keluarnya surat niat ('LOI') oleh kerajaan. Tranche kedua sejumlah 50% daripada jumlah yang berbaki, terakru apabila yuran pengerahan diterima daripada kerajaan. Tranche

ketiga, iaitu 50% daripada jumlah berbaki, terakru apabila pembayaran ikut kerja pertama diterima daripada kerajaan. Disebabkan defendan gagal membayar plaintif jumlah yang dipersetujui di bawah perjanjian tersebut, plaintif memulakan tindakan ini terhadap defendan di mahkamah sesyen. Defendan mempertikaikan keseluruhan tuntutan plaintif. Semasa perbicaraan di mahkamah sesyen, plaintif dan defendan mencapai persetujuan dan merekodkan penghakiman persetujuan, di mana tanpa pengakuan terhadap liabiliti, defendan bersetuju membayar plaintif sebanyak RM65,000 sebagai pembayaran penuh dan muktamad terhadap tuntutan plaintif yang mana adalah berdasarkan perjanjian tersebut. Kemudiannya, plaintif memulakan tindakan ini terhadap defendan atas dasar perjanjian yang sama di mana plaintif kini mendakwa bahawa memandangkan nilai kontrak kerajaan yang diberikan ialah RM11,700,000 maka 4% daripada nilai projek tersebut ialah RM486,000. Dalam tindakan ini, plaintif menuntut jumlah RM368,000 yang merupakan tranche kedua dan ketiga yang terakru di bawah perjanjian tersebut setelah menolak sejumlah RM100,000 bagi tranche pertama yang dituntut di mahkamah sesyen. Defendan menghujah bahawa memandangkan jumlah yang dituntut berbangkit daripada perjanjian tersebut, plaintif sepatutnya menuntut keseluruhan jumlah terakru dalam tindakan pertamanya di mana penghakiman persetujuan direkodkan. Oleh itu, defendan menghujah bahawa plaintif diestop sepenuhnya daripada memulakan tindakan ini terhadap mereka disebabkan doktrin res judicata dan juga berikutan dengan penghakiman persetujuan yang telah dimasukkan dalam tindakan di mahkamah sesyen. Plaintif walau bagaimanapun menghujah bahawa guaman ini di antara pihak-pihak adalah berkaitan kemungkiran perjanjian tersebut oleh defendan berkaitan tuntutan-tuntutan ansuran kedua dan ketiga. Selanjutnya, penghakiman persetujuan dimasukkan tanpa pengakuan ke atas liabiliti dan tanpa prejudis. Timbalan pendaftar membenarkan permohonan defendan membatalkan tuntutan plaintif kerana merupakan penyalahgunaan proses mahkamah. Menentang keputusan tersebut, plaintif merayu ke mahkamah ini dan satu-satunya isu untuk dipertimbangkan oleh mahkamah ini adalah sama ada tuntutan plaintif merupakan penyalahgunaan proses.

Diputuskan, menolak rayuan plaintif dengan kos:

(1) Prinsip res judicata terpakai dalam kes ini. Plaintif gagal mengemukakan keseluruhan kesnya, malah sepertinya telah membawa sebahagian kesnya di mahkamah sesyen dan cuba membawa kes yang selebihnya ke Mahkamah Tinggi walaupun kes yang sama boleh diselesaikan secara adil dalam prosiding yang terdahulu antara pihak yang sama. Mahkamah ini mestilah berjaga-jaga dalam menghalang satu pihak daripada mendesak semula dalam prosiding berikutnya aduan yang boleh diselesaikan secara adil dalam prosiding terdahulu antara pihak-pihak yang sama di mahkamah sesyen (lihat perenggan 17).

(2) Adalah jelas pada penghakiman persetujuan tersebut dan daripada pembacaan biasa menunjukkan bahawa penghakiman tersebut adalah penyelesaian penuh dan muktamad. Tidak dinyatakan di dalam terma-terma penghakiman persetujuan tersebut menyatakan bahawa plaintif diperuntukkan hak untuk meneruskan tuntutan di bawah perenggan 2 dan 3 perjanjian tersebut (lihat perenggan 24).

(3) Terma-terma penghakiman persetujuan mestilah dibaca dan difahami seperti yang dinyatakan dan plaintif tidak harus dibenarkan menambah ayat-ayat atau mengubah terma-terma penghakiman persetujuan itu. Adalah menjadi undang-undang tetap bahawa perintah persetujuan merupakan keterangan kontrak antara pihak-pihak dan mengikat kesemua pihak kepada perintah tersebut (lihat perenggan 25).]

Notes

For cases on consent order, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4513–4531.

For cases on res judicata, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reisssue) paras 2890–2906.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

Haji Mohamed Zebidi bin Haji Salleh & Anor v Dato' Haji Abdullah bin Mohd Hussain & Ors [1994] MLJU 54; [1994] 1 CLJ 70, HC (refd)

Malayan Banking Bhd v Teguh Consolidated Sdn Bhd & Anor and another action [1997] MLJU 245; [1998] 1 CLJ 254, HC (refd)

Simpang Empat Plantation Sdn Bhd v Ali bin Tan Sri Abdul Kadir & Ors [2006] 1 MLJ 193; [2006] 1 CLJ 41, CA (folld)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1), (1)(d)

Kushvinder (Thara Singh Sidhu & Kushvinder) for the plaintiff/appellant.
Rajashree Suppiah (MF Loh & Co) for the defendant/respondent.

Kamardin Hashim JC:

[1] This is my judgment in respect of the appellant/plaintiff's appeal against the decision of learned deputy registrar who allowed the respondent/defendant's application to strike out the plaintiff's claim under O 18 r 19(1)(d) of the Rules of the High Court 1980 ('RHC') which is an abuse of the process of the court.

[2] Therefore, the only issue before the court is whether the plaintiff's claim, as filed herein, is an abuse of process or not.

BRIEF FACTS

[3] By way of a letter of undertaking dated 18 November 1999 ('the said agreement'), the defendant agreed to pay the plaintiff 4% of the total project value of a government contract to build a school in consideration of the plaintiff securing the contract for the defendant. The mode of payment under the said agreement was agreed to be in three tranches/installments. First tranche for the sum of RM100,000 was due upon the issuance of the letter of intent ('LOI') by the government. The second tranche that is for the amount of 50% of the remaining amount was due upon receipt of mobilisation fee from the government and the third tranche ie 50% of the remaining amount was due upon receipt of the first progress payment from the government.

[4] The LOI was issued by the government (Ministry of Education) on 8 June 2000 offering the defendant the contract to build a school, ie SMK Taman Rinting, Kluang, Johor.

[5] On 12 September 2000, the plaintiff herein had commenced an action in the sessions court vide civil suit No 52–3196 of 2000 against the defendant herein based on the said agreement on the failure of the defendant to pay the plaintiff the sums agreed under the said agreement. The defendant herein has filed a defence disputing the plaintiff's entire claim.

[6] During the trial at the sessions court, the plaintiff and the defendant reached a settlement and recorded a consent judgment on 15 February 2006, wherein without admission of liability the defendant herein agreed to pay the plaintiff's the sum of RM65,000 only as full and final settlement of the plaintiff's claim which was based on the said agreement.

[7] On 21 March 2007, the plaintiff commenced the present action against the defendant based on the same said agreement wherein the plaintiff now alleges that since the government contract value awarded in 2001 was for RM11,700,000, therefore the 4% of the value of the project would come to RM486,000. The plaintiff now in the present action is claiming for the sum of RM368,000 which represent the second and the third tranches due under the said agreement after deducting the sum of RM100,000 for the first tranche claimed in the sessions court.

THE DEFENDANT'S SUBMISSION

[8] The defendant submitted that since the sums claimed herein arose from

the said agreement, the plaintiff ought to have claimed all of the sums due in its first action wherein a consent judgment was recorded in 2006. The plaintiff is not entitled to commence litigation in installment against the defendant. The plaintiff is estopped entirely from commencing this present action against the defendant due to the doctrine of res judicata and also in view of the consent judgment entered in the sessions court action.

THE PLAINTIFF'S SUBMISSION

[9] The plaintiff submit that the present suit between the parties is in respect of the breach of the said agreement by the defendant in respect of claims for the second and third installments. The consent judgment was entered without admission of liability and on a without prejudice basis. This shows that both parties had agreed that the settlement recorded in the sessions court action would not prejudice the plaintiff from filing a separate proceedings against the defendant in respect of the claim for the second and third installments under the said agreement.

DECISION OF THE DEPUTY REGISTRAR

[10] The learned deputy registrar allowed the defendant's application after relying on the decision of the Federal Court in the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 which is based on the doctrine of res judicata. The learned deputy registrar is of the opinion that the doctrine of res judicata applied in this case as the claim for 50% of the remaining amount upon receipt of mobilisation fee from the government and 50% of the remaining amount upon receipt of the first progress payment from the government and the claim for the sum of RM100,00 for breach of a contract in the previous action in the sessions court were clearly identical, resting as they were on the same facts or issue and that both claims were based on the same letter of undertaking (the said agreement).

THE LAW

[11] The law on striking out pleadings are as provided under O 18 r 19(1) of the RHC, which states as follows:

> Striking out pleadings and endorsements (O 18 r 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) ...

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[12] The principle applicable had been explained in *Malayan Banking Bhd v Teguh Consolidated Sdn Bhd & Anor and another action* [1997] MLJU 245; [1998] 1 CLJ 254:

> It is trite law that the court will only strike out pleadings in plain and obvious cases or where the claim on the face of it is obviously unsustainable. In determining whether to strike out cases under O 18 r 19 of the RHC, the courts have wide discretionary powers. The High Court also has an inherent jurisdiction to prevent an abuse of its powers. Even if O 18 r 19 of the RHC is not expressly pleaded, the High Court in exercise of its inherent jurisdiction may strike out cases which it deems to be an abuse of its process. Except for an application under O 18 r 19(1)(a) of the RHC, on determining whether an action ought to be struck off under the other rules, the High Court ought to consider all the relevant evidence as stated in the affidavits before it.

[13] The law on the doctrine of res judicata had been laid down in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783. In that case, the court explained as follows:

> What is res judicata? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicature*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that it is in the public interest that there should be finality in litigation — *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action — nemo debet bis vexari pro eadem causa. Both maxims are the rationales for the doctrine of res judicata, but the earlier maxim has the further elevated status of a question of public policy.

[14] In the case of *Simpang Empat Plantation Sdn Bhd v Ali bin Tan Sri Abdul Kadir & Ors* [2006] 1 MLJ 193; [2006] 1 CLJ 41 which explains the law on res judicata extensively and which I gratefully adopt. In that case the learned Court of Appeal Judge Dato' Gopal Sri Ram (now FCJ) stated as follows:

> The first point that has to be decided is whether res judicata applies here. In order to do that, it is, I think, desirable to remind myself of the nature and ambit of the doctrine. In *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346; [2001] 2 CLJ 321, this court had occasion to discuss these points.

A And I quote:

> Now, res judicata is not merely a technical rule of pleading. It is a doctrine of substantial justice. It is a process whereby justice is achieved procedurally by precluding a party from re-agitating in subsequent proceedings a complaint or an
B issue that has, or could fairly have been disposed in earlier proceedings between the same parties or their privies. It is merely equity in action in the procedural arena. It is sometimes referred to as the rule in *Henderson v Henderson* [1843] 67 ER 313. In that case, Wigram VC said:
>
C In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which
D was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising
E reasonable diligence, might have brought forward at the time.

[15] In the *Asia Commercial* case the learned judge explained the difference between issue estoppel and action estoppel as follows:

F Thus, there are in fact two kinds of estoppel per rem judicatum. The first type relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first type.
>
> The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a
G final judgment and such right of action ie the cause of action, merges into the said final judgment; in layman's language, the cause of action has turned into the said final judgment. The said cause of action may not be relitigated between the same parties because it is res judicata.
>
> In order to prevent multiplicity of actions and also in order to protect the underlying
H rationales of estoppel per rem judicatum and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment and which were not either deliberately or due to inadvertence ...

I

SPECIAL CIRCUMSTANCES

[16] In the case of *Simpang Empat*, we are also reminded that action estoppel/res judicata being a rule of equity is not absolute. The Court of Appeal

therefore quoted the following passage to state that where there are special circumstances, then the estoppel rule may be disregarded by the court:

> In *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 at p 109, Lord Keith of Kinkel expressed the following view:
>
> > In my opinion Your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss* case [1966] 2 All ER 536 at p 573; [1967] 1 AC 853 at p 947.

FINDINGS OF THE COURT

[17] I am of the opinion that the above principle of res judicata applies in the present case. The plaintiff had failed to bring forward its whole case and instead appears to have brought part of its case in the sessions court and now attempts to bring the rest of its case in the High Court although the same could fairly have been disposed in earlier proceedings between the same parties. This court must be vigilant in precluding a party from re-agitating in subsequent proceedings a complaint which could fairly have been disposed in earlier proceedings between the same parties in the sessions court.

[18] The plaintiff submits that their claim in the sessions court only concerned para 1 of the said agreement whereas their claim in the High Court concerns paras 2 and 3 of the said agreement and therefore the principle of res judicata was inapplicable in the circumstance of the case (presumably since there is no decision in respect of paras 2 and 3 of the said agreement). I do not agree with the contentions.

[19] Estoppel in its wider sense ie action estoppel applies here. Since the plaintiff could have brought its claim under paras 2 and 3 of the said agreement when it first commenced proceedings against the defendant but it did not do so, the plaintiff now must bear the consequences of its failure. Otherwise there will be no finality to litigation if parties decide to pick and choose which paragraph or clause of a contract they wish to sue upon and litigate in bits and pieces here and there in different court. As decided by the learned Court of Appeal judge in *Simpang Empat* case as follows:

> The doctrine may thus be seen to encompass several categories. In its narrowest sense, res judicata, I think, refers to estoppel by record. It refers to the actual decision of the earlier action or proceedings. In its wider sense, it encompasses issues and causes of action that could justly and fairly have been equally adjudicated in the earlier suit or proceedings. This wider operation of the doctrine is sometimes referred to 'constructive res judicata'. It houses the twin concepts of issue estoppel and cause of action estoppel. Like the tree of which they form the branches, they are designed to ensure that there is finality in litigation.

[20] In the present case, the plaintiff has failed to show any special circumstances necessary as required in the *Simpang Empat* case to escape the consequences of the res judicata rule. Having carefully read through the affidavits filed by the plaintiff (encls 11 and 14), I found that there are no averments explaining why the plaintiff did not bring the entire case before the court from the beginning and no special circumstances which would show why the claim on paras 2 and 3 of the said agreement could not by reasonable diligence have been adduced in the earlier proceedings. It must be borne in mind that the consent judgment was recorded in 2006, therefore the plaintiff had ample time to bring its claim for the balance under paras 2 and 3 of the said agreement after the government contract was awarded in 2001. It is trite law that there must be material before this court in order to make a finding especially in a case where the court needs to find special circumstances.

[21] The fact that the plaintiff had no special circumstances can be seen from its own averment in para 7 of encl 14, where the deponent for the plaintiff avers 'Saya dinasihati oleh peguamcara saya dan sesungguhnya percaya bahawa pihak plaintif mempunyai hak bagaimana hendak membawa tindakan terhadap defendan atas kemungkiran perjanjian dan melibatkan isu-isu dan fakta-fakta yang berlainan dan atas peruntukan-peruntukan undang-undang'. Instead of showing special circumstances, the plaintiff appears to state that the plaintiff has a right as to how he brings an action against the defendant. The position taken by the plaintiff is wrong, and I reiterate the relevant passage from the *Simpang Empat* case:

> In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[22] Without special circumstances, the action estoppel rule applies to preclude the plaintiff here from pursuing the claim against the defendant. Contrary to the plaintiff averment, I hold that the plaintiff has no right to bring an action in installments against the defendant.

[23] For easy reference, the entire terms of the consent judgment recorded on 28 April 2006 is reproduced herein below:

> PENGHAKIMAN PERSETUJUAN
>
> TINDAKAN INI setelah dipanggil untuk perbicaraan pada hari ini di hadapan Tuan Allaudeen bin Ismail, Hakim Mahkamah Sesyen Johor Bahru dengan kehadiran En. Nizam Bashir bin Abdul Kariem Bashir dan En. Kushvinder Singh Peguam Plaintif serta En. P. Nadaraja Peguamcara Defendan:
>
> DENGAN PERSETUJUAN DIHAKIMI PADA HARI INI DAN TANPA PENGAKUAN LIABILITI SERTA PRASANGKA Defendan hendaklah membayar kepada Plaintif jumlah sebanyak RM65,000 sebagai penyelesaian penuh dan muktamad termasuk faedah untuk tuntutan Plaintif dalam tindakan ini dan tiada perintah kos dan bayaran jumlah tersebut dibayar melalui Dua (2) ansuran bulanan sebanyak RM32,500 sebulan dimana bayaran pertama dibuat ada akhir bulan Februari 2006 dan bayaran kedua pada akhir Mac 2006.

[24] By looking at the consent judgment, it is clear on the face of it and from the plain and ordinary reading that it is expressed to be a full and final settlement. There is nothing expressed in the terms of the consent judgment stating that the plaintiff had reserved the right to pursue the claim under paras 2 and 3 of the said agreement. The plaintiff had attempted to advance an argument that 'TANPA PENGAKUAN LIABILITI DAN PRASANGKA' refers to the plaintiff's right to pursue its claims under paras 2 and 3 of the said agreement. With respect, I do not agree with that advancement. Those words can only be applied to the defendant who is compromising its position, because it is the defendant who is the party that is conceding to the plaintiff albeit without admission of liability and of course without prejudice to the defendant's position.

[25] The plaintiff did not expressly reserve its rights as the consent judgment does not contain any evidence of the parties 'agreeing that it will not prejudice the plaintiff's claim under paras (2) and (3) of the said undertaking which shall be part of a separate action' as submitted. The above words or terms are nowhere to be found in the consent judgment. It is very telling that the plaintiff to date has taken no action to clarify the terms of the consent judgment or applied to amend the terms of the consent judgment under the slip rule of the RHC if its contention were true. In other words, if the consent judgment against the defendant does not correctly state what the parties intended, then the plaintiff ought to have taken steps to rectify the same when the judgment was recorded in 2006 itself. The terms of the consent judgment must be read

and understood as it stands and the plaintiff ought not be allowed to add words or vary the terms of the said consent judgment. It is trite law that a consent order is evidence of the contract between the parties and is binding on all parties to the order. This principle had been decided in the case of *Haji Mohamed Zebidi bin Haji Salleh & Anor v Dato' Haji Abdullah bin Mohd Hussain & Ors* [1994] MLJU 54; [1994] 1 CLJ 70, where the issue was whether a party to a settlement has the right to vary a consent order. In that case the court held:

> In my judgment, there is no running away from the fact that every point was considered by the plaintiffs and the defendants before they entered into the consent order. With reasonable diligence, the plaintiffs should forsee the obstacles ahead and come up with a good formula to settle the case once and for all. There was no error in expressing the intention of the court when the consent order was drawn up. Everything was laid on the table. Consequently, the plaintiffs are now estopped by conduct from seeking to have the consent order varied.

[26] The Supreme Court in the case of *Asia commercial* concluded that the rationale behind the doctrine of res judicata, in other words, with the doctrine of estoppel per rem judicatum, as follows:

> It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and the expanding resources of the courts being found always one step behind the resulting increase in litigation.

[27] In that case the Supreme Court endorsed the decision that litigation on issues which could have been raised would tantamount to an abuse of process.

> 'It is further necessary at this stage to understand the import of the words in the said famous statement ie '... every point which properly belonged to the subject of litigation ... ' which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:
>
> > ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

CONCLUSION

[28] For the reasons adumbrated above, I dismiss the plaintiff's appeal with

costs. The decision of the learned deputy registrar in allowing the defendant's striking out application in encl 9 is hereby upheld.

Plaintiff's appeal dismissed with costs.

Reported by Ashgar Ali Ali Mohamed